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In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM EARL MATTLOCK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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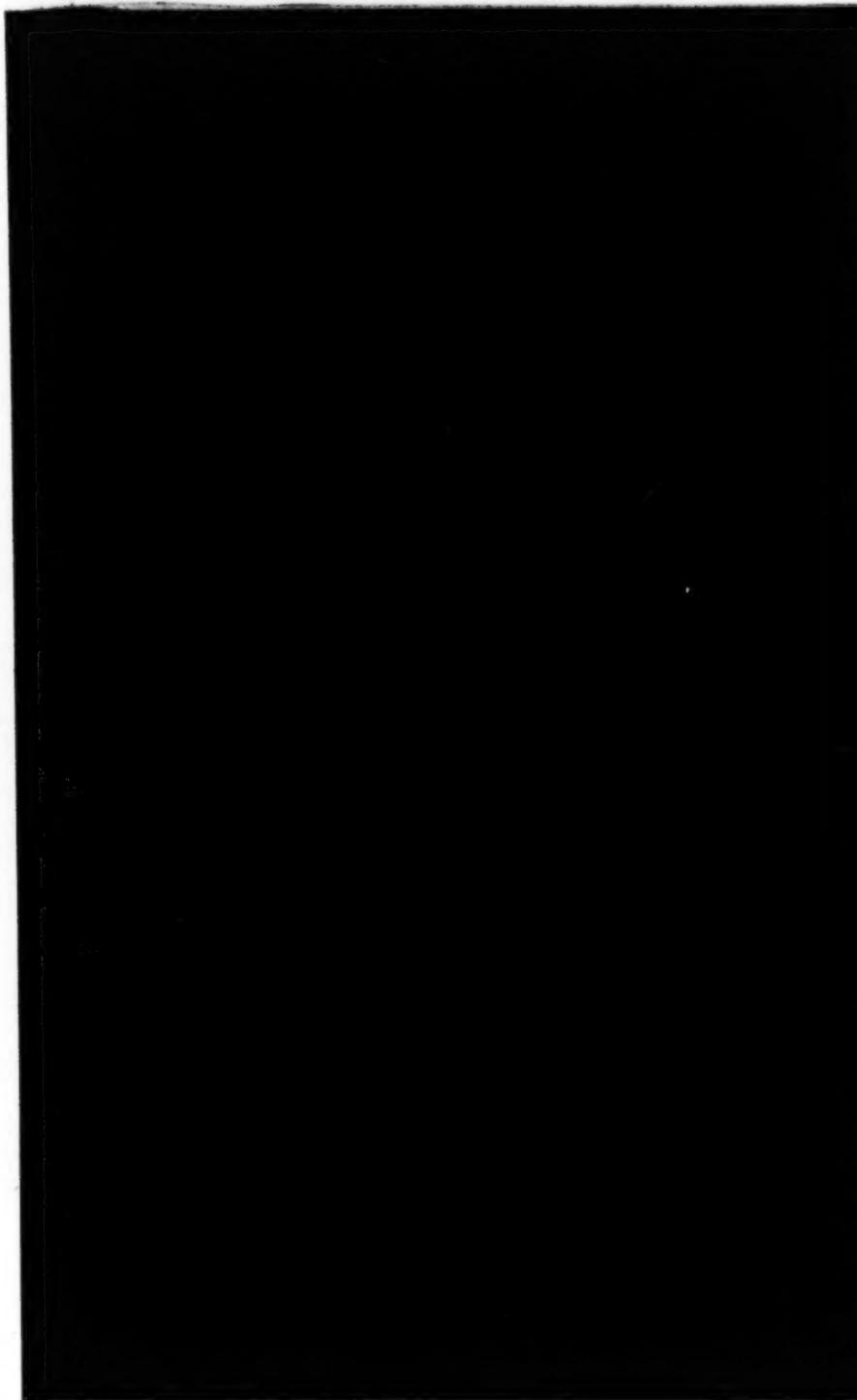
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-8a) is reported at 476 F. 2d 1083. The final opinion and order of the district court (Pet. App. C, pp. 10a-20a) are not reported. Two earlier opinions of the district court which were superseded by its final opinion (Pet. Apps. D and E, pp. 21a-32a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 9a) was entered on February 5, 1973. On February 26, 1973, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to April 6,

1973, and the petition was filed on that date. The petition was granted on May 29, 1973 (A. 40).¹ The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, to establish the validity of a warrantless search consented to by a third party reasonably appearing to have authority to consent to the search, the government must prove that the consenting party also had the actual authority to consent to the search.
2. Whether, in opposing a motion to suppress evidence on the ground that the consent to the search was not valid, the government must prove the sufficiency of the consent "to a reasonable certainty."
3. Whether the hearsay rule applies to the introduction of evidence at suppression hearings and, if so, whether the out-of-court statements by respondent and a woman that they were married were inadmissible to show their joint occupancy of the bedroom which the woman authorized police officers to search.

STATEMENT

Respondent was indicted for bank robbery (18 U.S.C. 2113) in the United States District Court for the Western District of Wisconsin. He moved to suppress certain items, including \$4,995 in cash, that had been seized in the course of three searches of a house in which he had rented a bedroom. The motion was granted as to some of the items, including the \$4,995, and denied as to others (Pet. App. C, pp. 10a-20a). On appeal by the United States, the court of appeals affirmed (Pet. App. A, pp. 1a-8a).

¹ "A." refers to the printed Appendix filed with the Clerk.

1. On the morning of November 12, 1970, respondent was arrested by local police officers in the yard of a house rented by Mr. and Mrs. Walter Marshall in Pardeeville, Wisconsin (Pet. App. C, pp. 10a-11a). The residents of the house, at the time, were Mrs. Marshall, her three children (including her daughter, Mrs. Gayle Graff), Mrs. Graff's three-year-old son, and respondent (Pet. App. C, p. 11a).

Immediately after respondent's arrest, three local police officers went to the door of the Marshall house and were admitted by Mrs. Graff (Pet. App. C, p. 12a). The officers told her that they were looking for money and a gun they believed to be hidden in the house and they asked if they could make a search (*ibid.*).² Mrs. Graff consented (*ibid.*).³ Mrs. Graff told

² The officers testified that Mrs. Graff was very cooperative and that she said she had nothing to hide (A. 9, 12, 16). The officers did not specifically inform Mrs. Graff that she had the right to withhold consent. The question whether investigating officers are required, as a condition of a valid consent search, to inform the consenting person of the right to withhold consent was not considered by the courts below because they held the search to be invalid on other grounds (Pet. App. C, p. 17a; cf. Pet. App. A, p. 2a, n. 1). We note that this Court has since held that failure by the officers so to inform the consenting person does not *per se* invalidate the search, but is merely one factor to be considered in determining whether, under all the circumstances, the consent was voluntarily given. *Schneckloth v. Bustamonte*, No. 71-732, decided May 29, 1973.

Mrs. Graff herself testified at the suppression hearing that she never consented to any search of the premises (Transcript of proceedings, April 5, 1971, pp. 91-92, 93-94). The district court discredited this testimony (Pet. App. C, p. 12a). Mrs. Graff was subsequently indicted for, and convicted of, perjury in her testimony at the hearing. Imposition of sentence was suspended and she was placed on probation for two years.

the officers that respondent "was sleeping in an upstairs bedroom which is also occupied by her" (A. 15) and that "she slept in the same bed" (A. 13, see also A. 10 and A. 16). She specifically consented to their searching that room (the "east bedroom") (Pet. App. C, p. 12a).³

At the time of the search there was a double bed in the east bedroom with two pillows on it and the bed presented the appearance of having been slept in (Pet. App. C, p. 16a). There was men's and women's clothing in the closet (*ibid.*). There was a four-drawer dresser in the room, two drawers of which contained men's clothing and the other two of which contained women's clothing (*ibid.*). Mrs. Graff told the officers, "Bill [respondent] has the two bottom drawers and the two top drawers are mine" (Pet. App. C, pp. 15a, 16a; A. 22-23).

In searching the bedroom, the officers discovered and seized \$4,995 in cash concealed in the closet (Pet. App. A, p. 2a; Pet. App. C, p. 12a; A. 13-14). The legality of that seizure is the only issue presented.⁴

³ None of the officers asked Mrs. Graff whether respondent occupied the room as a guest or as a paying tenant, whether she and respondent were married, or whether they had been living together as husband and wife, and Mrs. Graff said nothing to the officers on these subjects (Pet. App. C, p. 12a).

⁴ In addition to the cash, certain other items were discovered and seized in the course of later searches of the east bedroom and other parts of the house. The district court ordered some of those items suppressed in addition to the money. For the reasons explained in the petition (pp. 4-5, n. 2), we have not contested in this Court the suppression of any item other than the money.

2. Additional evidence was introduced at the suppression hearing tending to show that respondent and Mrs. Graff were, in fact, joint occupants of the east bedroom. Respondent, Mrs. Graff and her child had been living at the house since the preceding summer, when they arrived together from Florida; previously they had lived together for five months in a one-bedroom apartment in Florida (Pet. App. C, pp. 11a, 15a). Respondent had agreed to pay the Marshalls \$25 per week for room and board (Pet. App. C, p. 11a). He was current in these payments, or nearly so, at the time of his arrest (Pet. App. C, pp. 11a-12a).

After, but on the same day as, the search in question Mrs. Graff told F.B.I. agents that she and respondent had been sleeping together in the east bedroom regularly, including the early morning hours of that day (Pet. App. C, p. 15a; A. 23-24, 26-27). She also told the agents that, while she was not lawfully married to respondent, "I consider myself a common-law wife" (A. 24, see also A. 27).

Prior to respondent's arrest, at various times and places, and to various persons, both respondent and Mrs. Graff had represented that they were married or had made statements indicating that they were husband and wife (Pet. App. C, p. 15a). In September, 1970, Mrs. Graff had introduced respondent to her employer as her husband (A. 33-34) and respondent, in a conversation with the wife of the employer (for whom respondent was then also working), had referred to Mrs. Graff as his wife (A. 30-31). In the same month Mrs. Marshall introduced respondent

to an acquaintance as "Gayle's husband." Respondent did not deny it⁸ (A. 37-38). Finally, Mrs. Graff's former husband testified that when he took some papers to Mrs. Graff at the Marshall house, respondent told him, "Leave her alone. She's not your responsibility, she is mine" (Transcript of proceedings, June 22, 1971, pp. 59-60).

There was also additional testimony from neighbors that on various occasions they had seen respondent and Mrs. Graff openly going to, or coming from, the east bedroom (Pet. App C, pp. 15a-16a).

3. The district court found that the circumstances as they appeared to the officers just prior to their search of the east bedroom, including Mrs. Graff's statement to the officers that she and respondent occupied the bedroom, reasonably indicated to the officers that she was a joint occupant of the room; the court therefore concluded that "just prior to the search, it reasonably appeared to the searching officers that facts existed which would render [Mrs.] Graff's consent [to the search of the bedroom] binding on [respondent]" (Pet. App. C, p. 14a).

The court held, however, that where consent given by a third person is relied upon as the justification for a search, the government must show, not only that

⁸ A police officer testified that, the afternoon after the search, Mrs. Marshall told F.B.I. agents that respondent and Mrs. Graff were married "to the best of my knowledge. * * * But I don't feel it was any of my business to really ask or pry * * *" (Transcript of proceedings, April 5, 1971, pp. 120-121). However, at the hearing, Mrs. Marshall testified that she did not think respondent and Mrs. Graff were married, and had never told anyone that they were (Supplemental transcript of proceedings, April 5, 1971, p. 14).

it reasonably appeared to the officers that the person had authority to consent, but also that the person had actual authority to permit the search.

In assessing whether the government had shown that Mrs. Graff and respondent had in fact been joint occupants of the bedroom, the court expressly disregarded, on the ground that they constituted inadmissible hearsay, (1) Mrs. Graff's statements to the local officers at the time of the search acknowledging that she and respondent jointly occupied the bedroom and shared its dresser, and that the women's clothing in the dresser was hers (*supra*, pp. 3-4) (Pet. App. C, pp. 15a, 16a), (2) Mrs. Graff's statement to the federal agents after the search that she and respondent had been regularly sleeping in the bedroom (*supra*, p. 5) (Pet. App. C, p. 15a), and (3) the statements which Mrs. Graff and respondent had both made, to persons in the community prior to the search, indicating that they were husband and wife (*supra*, pp. 5-6) (*ibid.*). The only evidence on the subject of joint occupancy considered by the court was, therefore, the evidence that Mrs. Graff and respondent had lived together for five months in a one-bedroom Florida apartment just prior to their taking up residence in the Marshall home; their occasional coming from and going to the east bedroom; the slept-in appearance of the two-pillow double bed at the time of the search; and the presence of both men's and women's clothing in the closet and dresser (Pet. App. C, pp. 15a, 16a).

Excluding what it considered inadmissible hearsay, the court ruled that the government had failed to establish—to the requisite degree of certainty (see note

6, *infra*)—that respondent and Mrs. Graff had in fact jointly occupied the east bedroom and concluded that Mrs. Graff had not had actual authority to consent to the search (Pet. App. C, pp. 14a-16a). The court therefore suppressed the evidence seized from the bedroom (Pet. App. C, p. 19a).

The court of appeals affirmed, holding that the validity of the search depended on proof of actual authority to consent, not merely apparent authority (Pet. App. A, pp. 4a-6a); that the government had had the burden of proving actual authority “to a reasonable certainty, by the great weight of the credible evidence” (Pet. App. A, pp. 6a-7a); and that the extrajudicial statements of Mrs. Graff and respondent had been properly excluded from the suppression hearing as hearsay (Pet. App. A, p. 7a).

¹⁶ The district court had stated in its opinion that the burden of proof borne by the government was proof “to a reasonable certainty, by the *greater* weight of the credible evidence” (Pet. App. C, pp. 10a, 16a; emphasis added). In its brief in the court of appeals, a copy of which is being lodged herewith, the government inadvertently misquoted the standard used by the district court as requiring proof “to a reasonable certainty, by the *great* weight of the credible evidence” (pp. 2, 18; emphasis added) and the court of appeals, in affirming the suppression order, approved the formulation that had been misquoted in the government’s brief. See note 12, *infra*.

SUMMARY OF ARGUMENT

The courts below properly recognized that either of two persons jointly occupying a room may validly consent to a search of the area subject to their joint control. It is undisputed that Mrs. Graff, with whose consent the search here was conducted, told the investigating officers just prior to the search that she and respondent jointly occupied the east bedroom, and that it reasonably appeared to the officers from the totality of the circumstances confronting them (including Mrs. Graff's statement) that such was the fact. It reasonably appeared to the officers, in other words, as the courts below properly conceded, that Mrs. Graff had the authority to permit them to search the room.

The courts erred in holding that to justify the search the government was required to prove, in addition, that Mrs. Graff in fact had this authority—to prove, in other words, that she was in fact a joint occupant of the bedroom. The Fourth Amendment prohibits only "unreasonable" searches and seizures. The test is whether the police action is reasonable when undertaken. Hence it was sufficient for Fourth Amendment purposes that the investigating officers here responded reasonably to the facts as they appeared—in accepting as true the evidently credible statement by Mrs. Graff that she and respondent shared the bedroom and in proceeding with confidence that they were validly authorized to search it. And, as we show later, Mrs. Graff did in fact have the right to permit the search.

To suppress evidence found in a search because the police may have made a reasonable mistake as to the authority of the consenting party to consent to the search would frustrate legitimate law enforcement without advancing the interests served by the exclusionary rule. The purpose of the exclusionary rule is to eliminate an incentive for lawless invasions of privacy by the police. Application of the rule when it is conceded that the officers acted reasonably does not further that objective.

II

If (notwithstanding our primary argument) the government is required to prove actual cohabitation, the court of appeals applied an erroneous standard of proof. The standard the court applied was proof "to a reasonable certainty, by the great weight of the credible evidence." The correct criterion is whether there has been proof by a preponderance of the evidence—a manifestly less stringent norm.

III

Even if the courts below were correct in requiring the government to prove that Mrs. Graff was in fact as well as appearance a joint occupant of the bedroom, they erred in holding inadmissible the out-of-court statements made by her and respondent indicating that they were living together as husband and wife.

Reliable evidence, though technically within the hearsay rule, may properly be considered by a court sitting without a jury at a suppression hearing. Because they are "the child of the jury system"

(Thayer), the technical common law rules of evidence have no proper place at a hearing in which no jury participates. As a consequence of his professional training and detached judicial temperament, a judge is expected to be able to make proper inferences from reliable evidence that under strict hearsay rules might be kept from a jury.

The validity of this submission is supported by the fact that the proposed new Federal Rules of Evidence specifically provide that in ruling on admissibility questions the judge is not bound by the rules of evidence (except those relating to privileges).

Mrs. Graff's out-of-court statements were reliable. They were candid, matter-of-fact, and, if not "against interest" in any legally recognized sense, at all events in no sense self-serving. In addition to being consistent with one another, furthermore, they were corroborated by the related evidence which the courts below conceded was admissible. There is, in short, no conceivable reason for not crediting them.

ARGUMENT

I

TO ESTABLISH THE LEGALITY OF THE SEARCH IT SUFFICED FOR THE GOVERNMENT TO SHOW THAT IT REASONABLY APPEARED TO THE INVESTIGATING OFFICERS THAT MRS. GRAFF HAD AUTHORITY AS A JOINT OCCUPANT TO CONSENT TO THE SEARCH AND THAT SHE DID IN FACT CONSENT TO IT.

The court below did not question the strong evidence that Mrs. Graff, who said she shared a room with the respondent, voluntarily consented to the

search made by the police, see pp.3-4, *supra*. The court, moreover, positively found "that facts existed * * * from which the officers could reasonably believe that * * * Graff * * * had authority to consent to a search and that [her consent] * * * would be binding upon the defendant" (Pet. App. A, pp. 2a-3a). But the court ruled that the government must prove that Mrs. Graff did *in fact* have "authority to bind defendant" for the evidence seized to be admissible (Pet. App. A, pp. 6a-7a) and that the government had failed in that proof (*ibid.*). This holding is erroneous. The requirement that the government prove the actual authority of a person who reasonably appears to have authority to consent to a search, and does consent, places a restriction on consent searches not required by the Fourth Amendment or the reasons for the exclusionary rule—and excludes probative and often definitive evidence that should be available to the courts.

⁷ It is settled that any of several persons sharing the use of a room, automobile, or even a duffel bag, may validly consent to a search of it. See, e.g., *Frazier v. Cupp*, 394 U.S. 731, 740; *Schneckloth v. Bustamonte*, *supra*, slip op. at p. 27. See also *United States v. Stone*, 471 F. 2d 170, 173 (C.A. 7), certiorari denied, April 16, 1973 (No. 72-1042); *United States v. Thompson*, 421 F. 2d 373, 375-377 (C.A. 5), vacated on other grounds, 400 U.S. 17; *United States v. Johnson*, 413 F. 2d 1396, 1400 (C.A. 5); *United States v. Mackiewicz*, 401 F. 2d 219, 223-224 (C.A. 2), certiorari denied, 393 U.S. 923; *United States v. Alloway*, 397 F. 2d 105, 108-110 (C.A. 6).

⁸ Both courts below appear mistakenly to have assumed that the reason the seized evidence is admissible against the absent

1. In *Schneckloth v. Bustamonte*, No. 71-732, decided May 29, 1973, this Court made clear that nothing in the policy of the Fourth Amendment is designed to discourage citizens from consenting to searches to aid in the apprehension of criminals. "Rather," the Court said, "the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense." Slip op. at p. 25. "And, unlike those constitutional guarantees that protect a defendant at trial, it cannot be said every reasonable presumption ought to

occupant is that the consenting occupant waives the absent occupant's Fourth Amendment rights (Pet. App. A, pp. 5a, 6a; Pet. App. C, pp. 14a, 16a, 18a; Pet. App. E, pp. 29a-30a). This notion, though occasionally encountered in the decisions relating to co-occupant consent searches (e.g., *Anderson v. United States*, 399 F. 2d 753, 756-757 (C.A. 10)), is unsound. A more accurate analysis is that the consenter has the right to allow the police to search the premises he occupies and that whatever evidence is found in that search is evidence found in a lawful search, admissible against all persons, including the co-occupant. No question of delegated authority to waive the absent occupant's constitutional rights is involved. As noted in *Roberts v. United States*, 332 F. 2d 892, 896-897 (C.A. 8), certiorari denied, 380 U.S. 980:

"It is not a question of agency, for a wife should not be held to have authority to waive her husband's constitutional rights. This is a question of the wife's own rights to authorize entry into premises where she lives and of which she had control." See also, *United States v. Stone*, *supra*, 471 F. 2d at 173; *United States v. Thompson*, *supra*, 421 F. 2d at 376; *United States v. Airdo*, 380 F. 2d 103, 106-107 (C.A. 7), certiorari denied, 389 U.S. 913; *Stein v. United States*, 166 F. 2d 851, 855 (C.A. 9), certiorari denied, 334 U.S. 844.

be indulged against voluntary relinquishment" (*ibid.*). As the Fourth Amendment prohibits only unreasonable searches, and as the exclusionary rule is designed to help enforce that mandate, the question should be whether it was unreasonable for the police to make the search they made in this case and whether any Fourth Amendment interest would be served in excluding the evidence.

In conducting an investigation, police officers must act on the basis of the facts as they appear at the time. What the Fourth Amendment requires is that their action be reasonable at the time it is undertaken. One aspect of the rule is that an entry made without probable cause cannot be validated by what the search later turns up. But the reverse of the proposition is equally sound: a subsequent discovery that the officers were misled by deceiving appearances does not change the fact that their action was reasonable.⁸ This Court expressly so recognized in *Hill v. California*, 401 U.S. 797. In that case the Court sustained the legality of a search of the defendant's apartment, without a warrant or the defendant's consent, incident to the arrest of a man who answered the door and whom the police reasonably but wrongly believed to be the defendant. In upholding the admissibility of evidence found in the apartment the Court noted, "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and

⁸ Here, however, the officers were not misled. Mrs. Graff correctly told the police that she lived in the room she authorized them to search.

the arrest a reasonable response to the situation facing them at the time" (401 U.S. at 804). Similarly, in the only case we have been able to find involving, like this one, a factual dispute over the consenting person's authority with respect to the searched premises, the California Supreme Court concluded (*People v. Gorg*, 45 Cal. 2d 776, 783):

[W]hen as in this case the officers have acted in good faith with the consent and at the request of a home owner in conducting a search, evidence so obtained cannot be excluded merely because the officers may have made a reasonable mistake as to the extent of the owner's authority.

See, also, *Gurleski v. United States*, 405 F. 2d 253, 261 (C.A. 5), certiorari denied, 395 U.S. 981; *People v. Hopper*, 268 Cal App. 2d 774, 779.

The reasoning of these cases applies here. It was sufficient for Fourth Amendment purposes that the investigating officers responded reasonably to the facts as they appeared—in accepting as true the evidently credible statement by Mrs. Graff that she and respondent shared the east bedroom, and in accepting her consent to search as valid.*

* We are not arguing that the searching officer's mere "good faith" is sufficient; his belief must be reasonable. Nor do we suggest that in every circumstance the inquiry ends after probing the searching officer's state of mind: his good faith belief that he has a valid warrant will not cure a defect in the underlying affidavit. But where, as here, there is no suggestion of prior official misconduct or unreasonable action, it is, we submit, wholly appropriate to test the propriety of the searching officer's conduct by viewing the situation as it appeared to him at the time.

Both opinions below pose the hypothetical case of an imposter

Stoner v. California, 376 U.S. 483, relied on by the court of appeals (Pet. App. A, p. 5a) and by respondent (Resp. to Pet., p. 10), is not to the contrary. There, the Court held that as a matter of law a hotel desk clerk, unless authorized by the occupant of the room, cannot consent to a search of a guest's room. Since the officers knew that the consenting person was the clerk and that he was not authorized by the occupant, no question of consent to a search by one reasonably believed to be an occupant was involved. The Court's statement that Fourth Amendment rights "are not to be eroded * * * by unrealistic doctrines of 'apparent authority'" (376 U.S. at 488) must be read in light of the entirely distinguishable fact-situation there presented. The comment has no relevance to this case, where the officers justifiably believed that the person authorizing the search was an occupant of the premises, because an occupant clearly has the authority to permit a search, see note 7, *supra*.

2. Even if it were held that it is not enough for the police reasonably to believe that they had consent to search, when the person giving consent is without actual authority, it does not mechanically follow that the exclusionary rule should apply. The application of

who consents to the search of premises and argue that this possibility requires the exclusion of evidence obtained in a search if the consenter does not in fact have the authority the police reasonably believed him to have. (Pet. App. A, p. 4a; Pet. App. C, p. 16a.) Nothing like the posed hypothetical situation is involved in this case and the resolution of that question should properly await a case involving those facts. However, *Hill v. California*, 401 U.S. 797, 804, strongly supports the proposition that the reasonable appearance at the time of the search, and not the later discovery as to identity, would govern.

that rule is based on the practical consideration of preventing unlawful police searches. *Mapp v. Ohio*, 367 U.S. 643, 656; *Elkins v. United States*, 364 U.S. 206, 217. In considering the question of the retroactivity of the exclusionary rule, where the deterrent effect of the rule could have little play, the Court held the rule inapplicable. *Linkletter v. Walker*, 381 U.S. 618, 629. The Court has also refused to apply the rule where illegally obtained evidence was used only for impeachment of a witness. *Walder v. United States*, 347 U.S. 62. See discussion in the concurring opinion of Justice Powell in *Schneckloth*, *supra*, slip op. at pp. 18-22. In the present case, the courts below have specifically found that the police reasonably believed that they had received a valid consent to search from a person who had the authority to give that consent (see pp. 6, 11-12, *supra*). It is difficult to see how, as a practical matter, an exclusion of the evidence obtained in a case such as this would prevent police unlawfulness, for the police reasonably believed that they were acting lawfully, and presumably would so believe in a future case.

II

THE COURT OF APPEALS APPLIED AN ERRONEOUS STANDARD OF PROOF IN DETERMINING THAT THE UNITED STATES HAD NOT SHOWN THAT MRS. GRAFF HAD ACTUAL AUTHORITY TO PERMIT THE SEARCH.

1. It is undisputed that the government proved that Mrs. Graff had reasonably appeared to the officers to be a co-occupant. Hence the question of the appropriate standard of proof need not be reached if the Court

accepts our principal contention—that it was the situation as it reasonably appeared to the officers that controlled the validity of the search. The district court, however, required proof at the suppression hearing that Mrs. Graff was in fact a co-habitant of the room. The test by which the district court appraised the sufficiency of the government's evidence on that point was by inquiring whether it had been proved "to a reasonable certainty, by the *greater* weight of the credible evidence" (Pet. App. C, pp. 10a, 16a; emphasis added). The court of appeals, on the mistaken assumption that the standard applied by the district court had been whether Mrs. Graff's joint occupancy had been proved "to a reasonable certainty, by the *great* weight of the credible evidence" (emphasis added), approved the latter standard (Pet. App. A, pp. 6a-7a).¹⁰ We submit that standard was erroneous.¹¹

The proper criterion of the sufficiency of the proof as to an issue of fact in a preliminary hearing on the admissibility of evidence is whether there has been proof by a preponderance of the evidence. *Lego v. Twomey*, 404 U.S. 477. In *Lego*, this Court rejected a contention that the voluntariness of a confession offered by the government must be proved beyond a reasonable doubt. The Court said (404 U.S. at 488; footnote omitted):

¹⁰ See note 6, *supra*, p. 8, for the circumstances that had caused the court of appeals to assume that the standard applied by the district court had been the one mentioned.

¹¹ We concede that the burden was on the government to prove the warrantless search valid. See *Vale v. Louisiana*, 399 U.S. 30, 34; *Chimel v. California*, 395 U.S. 752, 761; *Bumper v. North Carolina*, 391 U.S. 543, 548.

[W]e are unconvinced that merely emphasizing the importance of the values served by exclusionary rules is itself sufficient demonstration that the Constitution also requires admissibility to be proved beyond reasonable doubt. Evidence obtained in violation of the Fourth Amendment has been excluded from federal criminal trials for many years. *Weeks v. United States, supra*. The same is true of coerced confessions offered in either federal or state trials. *Bram v. United States*, 168 U. S. 532 (1897); *Brown v. Mississippi, supra*. But, from our experience over this period of time no substantial evidence has accumulated that federal rights have suffered from determining admissibility by a preponderance of the evidence. * * * Without good cause, we are unwilling to expand currently applicable exclusionary rules * * *.

Thus the court of appeals clearly erred in applying the strict standard it did to the government's effort to show that the challenged evidence had been lawfully seized.¹²

¹² The government, in reliance on *Lego*, had urged in its brief in the court of appeals that the preponderance standard was the correct one and had asked the court to remand the case to the district court with directions to reconsider, in the light of that standard, its finding that the government had not adequately proved Mrs. Graff's actual authority to authorize search (pp. 18-22). In making this argument the government had mistakenly assumed, as previously pointed out (note 6, *supra*, p. 8), that the standard applied by the district court had been proof "to a reasonable certainty, by the *great* weight of the credible evidence" (emphasis added). That standard was, of course, as we have suggested in the text, a substantially severer one than the preponderance criterion; indeed it approached, if it was not practically equivalent to, the strictest standard known to the law—proof beyond a reasonable doubt. Whether the

2. Notwithstanding that the court of appeals' error was based on a mistaken assumption as to the standard applied by the district court, and assuming (as we do for present purposes) that the trial court's statement of the standard was essentially correct (see note 12, *supra*), the error was nevertheless prejudicial. If either court had truly employed the correct standard (preponderance) in viewing the government's evidence that Mrs. Graff was in fact a joint occupant of the bedroom, it would have, we submit, concluded that the government's evidence met, or more than met, the test. Certainly, the court of appeals may have concurred in the district court's conclusion that the evidence fell short only because it assumed that more than a preponderance of the evidence was required to prove that Mrs. Graff actually occupied the room.

It follows, we suggest, that if the Court reaches the present issue, remand of the case to the court of appeals would be appropriate to enable that court to reconsider, in light of the proper standard of proof, the question whether the government sufficiently proved that Mrs. Graff was a joint occupant of the bedroom. This submission is independent of the related question,

standard actually employed by the district court—which it phrased proof “to a reasonable certainty, by the *greater weight* of the credible evidence” (emphasis added)—differs meaningfully from the correct standard (preponderance) is less clear. Cf. the Jury Instructions Committee's “Comment” accompanying 1 Wisconsin Board of Circuit Judges, *Wisconsin Jury Instructions*—Civil 200 (1972) (the source of the standard applied by the district court, see note 9, *supra*, p. 8): “The committee feels that *greater weight* is an exact synonym for fair preponderance and much more understandable to the average juror” (emphasis in original).

discussed next of whether evidence presented by the government on that issue was improperly disregarded as hearsay.

III

EVEN IF THE COURTS BELOW PROPERLY REQUIRED THE GOVERNMENT TO PROVE THAT MRS. GRAFF WAS IN FACT AS WELL AS APPEARANCE A JOINT OCCUPANT OF THE EAST BEDROOM, THEY ERRED IN HOLDING INADMISSIBLE THE OUT-OF-COURT STATEMENTS MADE BY HER AND RESPONDENT INDICATING JOINT OCCUPANCY.

We assume in this Point, *arguendo*, as we did in Point II, that the government was required to show that Mrs. Graff was in fact as well as appearance a joint occupant of the east bedroom in order to prove the search valid. If the Court accepts our principal contention—that it was enough that it had reasonably appeared to the officers that Mrs. Graff was a co-occupant—it will have no occasion to consider the present issue.

The excluded statements consisted of (1) Mrs. Graff's statements to the investigating officers at the time of the search that she and respondent jointly occupied the bedroom and shared its dresser and that the women's clothing in the dresser was hers; (2) her statement to the federal agents following (but on the same day as) the search that she and respondent had been sleeping together in the bedroom regularly, including the early morning hours of that day;¹³ and

¹³ For the purpose of determining Mrs. Graff's *actual* authority to consent to the search, there is of course no objection to looking to evidence unavailable to the officers when they first

(3) the statements by both Mrs. Graff and respondent, made to persons in the community prior to the search, that they were husband and wife. *Supra*, p. 7. These statements were concededly hearsay, and none is readily classifiable under any of the standard exceptions to the hearsay rule. Nonetheless, we will argue that, as reliable hearsay, they are admissible at a suppression hearing before a district judge sitting without a jury.

A. Reliable hearsay may properly be considered in a suppression hearing before the court sitting without a jury.

The pretrial suppression hearing was held before a district judge sitting without a jury. The purpose of the hearing was to determine whether the money found in the closet of the east bedroom was admissible at respondent's upcoming trial for bank robbery. The admissibility of that evidence at the bank robbery trial depended on whether Mrs. Graff, who authorized the search of the room, had authority to do so; and that, in turn, depended on whether Mrs. Graff was a joint occupant of the room with respondent. Mrs. Graff made several acknowledgments to the searching officers, and later to F.B.I. agents, that she was a joint occupant of the room: both Mrs. Graff and respondent also made statements in the community that

entered. Indeed, both courts below properly considered, on this issue, the physical appearance of the searched room. It would be otherwise if (as we primarily contend) the correct test is whether the officers *reasonably believed* Mrs. Graff had authority to consent to the search; in that event, only what was known to the officers before they undertook the search would be relevant.

they were husband and wife. The district judge excluded these statements from consideration at the suppression hearing, on the ground that they constituted inadmissible hearsay. We contend that the judge erred in so doing—for the reason that the technical common law rules of evidence do not apply at such a juryless proceeding.

1. Wigmore declares, "In *preliminary rulings* by a judge on the admissibility of evidence, the ordinary rules of evidence do not apply." 5 Wigmore, *Evidence*, § 1385 (3d ed. 1940); emphasis in original. Wigmore states this principle without citation of supporting case law. The only supporting allusion is a reference to an earlier portion of his treatise in which he argues that the ordinary rules of evidence are not generally regarded as applicable at *ex parte*, interlocutory, extradition, or disbarment proceedings before the court because "there is no jury [in such proceedings], and the rules of Evidence are, as rules, traditionally associated with a trial by jury." 1 Wigmore, *Evidence*, § 4 (3d ed. 1940).

The pertinent historical case law on the applicability of the rules of evidence to preliminary hearings on admissibility of evidence is, as McCormick notes, "scattered and inconclusive." McCormick, *Evidence* § 53, pp. 123-124, n. 8 (1954).¹¹ McCormick observes

¹¹ Substantially the same conclusion was reached in an earlier and more exhaustive study, in which the early English and more recent American authorities were examined in some detail. Maguire and Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility*, 36 Yale L.J. 1101 (1927). As regards the English case authorities, the study concluded that Phipson, the English commentator on the law of evidence, had

that the American authorities "suggest that the judges trial and appellate give primacy here to habit rather than to practical adaptation to the situation, and tend to require the observance of jury-trial rules of evidence [at such hearings]." McCormick, *supra*, p. 124, n. 8.

But if Wigmore's statement is too categorical from a historical viewpoint, it is unexceptionable as a statement of principle. As "the child of the jury system" (Thayer, *A Preliminary Treatise on Evidence at the Common Law* 266 (1898)), the technical common law rules of evidence have no proper place at a hearing in which no jury has a role. "[O]ur law of evidence," Thayer noted, "is a piece of illogical, but by no means irrational, patchwork; not at all to be admired, nor easily to be found intelligible, except as a product of the jury system, as the outcome of a quantity of rulings by sagacious lawyers, while settling practical questions, in presiding over courts where ordinary, untrained citizens are acting as judges of fact." *Id.* at p. 509.

Since the purpose of rules of evidence is to seek to prevent "ordinary, untrained citizens" from mak-

summed up the situation more accurately than Wigmore when he noted, more cautiously, that "the better opinion is" that such admissibility hearings are not subject to the strict rules of evidence. Maguire and Epstein, *supra*, 36 Yale L.J. at 1101, 1111-1112. Cf. Phipson, *Evidence*, para. 24, p. 16 (10th ed. 1963). Phipson cites in this connection *Knight v. Campbell* (an 1848 *nisi prius* decision by Chief Baron Pollock, the only reference to which in print occurs in 1 Taylor, *Evidence*, § 517, note 7 (9th ed. 1897)) and *Duke of Beaufort v. Crawshay*, L.R. 1 C.P. 699 (1866). The decisions referred to are discussed in Maguire and Epstein, *supra*, 36 Yale L.J. at 1110-1111.

ing unwarranted inferences from otherwise probative material,"¹⁵ it is evident that the reason for the rules ceases when a judge alone is deciding the issue. As a consequence of professional training and detached judicial temperament, a judge is expected to be on the alert against the kind of unwarranted inference-making which the evidence rules are designed to prevent. McCormick is right, therefore, when he states:

Should the exclusionary law of evidence, "the child of the jury system" in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay.

Op. cit. supra, pp. 123-124, n. 8.

This Court has noted that, absent an express statutory requirement to the contrary, "it has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies * * *." *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 155 and cases cited.¹⁶ Cf. *Morrissey v. Brewer*, 408 U.S.

¹⁵ The rules of evidence "operate to exclude relevant evidence." McCormick, *supra*, § 53. "And chiefly, it [the law of evidence] determines, *as among probative matters*, * * * what classes of things shall not be received. This excluding function is the characteristic one in our law of evidence" (emphasis added) (Thayer, *supra*, at p. 264).

¹⁶ *Bridges v. Wixon*, 326 U.S. 135, 153-154, cited by the court of appeals (Pet. App. A, p. 7a), is not to the contrary. There, as this Court noted, the hearsay statements the introduction of which was held to have rendered the deportation proceeding unfair were admitted in violation of regulations of the Immi-

471, 489 (evidence rules not applicable to parole revocation hearings). No more, it is submitted, should they apply to juryless court proceedings.

2. We do not suggest, of course, that *none* of the rules of evidence should apply at such proceedings. Certain of the rules—those involving privileges of various kinds are examples—are based on reasons of policy that have no relation to the objective of guarding untrained laymen against the dangers of erroneous factfinding. Cf. 8 Wigmore, *Evidence*, § 2175 ff. (McNaughton rev. 1961). Manifestly there is no reason to relax the rules of that type merely because no jury is present.¹¹ But we do suggest that *reliable* hear-

gration and Naturalization Service (326 U.S. at 150-153). Moreover, the Court in *Bridges*, treating the deportation proceeding as in substance a criminal *trial*, and noting that defendants cannot be *convicted* on the basis of hearsay, reasoned that it would be equally inappropriate to permit deportation on such evidence (326 U.S. at 153-154). That aspect of the *Bridges* rationale is, of course, inapposite here, since there is no question here of the admissibility of hearsay at petitioner's trial—but only of its admissibility at a pretrial hearing concerning the admissibility at trial of other evidence.

¹¹ See Maguire and Epstein, *supra*, 36 Yale L. J. at 1101-1102:

"None of the quotations above [quotations from Wigmore and other commentators favoring the non-applicability of the ordinary rules of evidence to juryless admissibility hearings] should be taken to mean that *every* rule of evidence goes by the board in these preliminary judicial inquiries. The mere shift from ultimate to introductory questions and from jury to judge furnishes no cause for discarding such doctrines as the marital privileges and incompetencies, the privilege against self-incrimination, the privilege protecting state secrets, or the lawyer-client privilege. All these doctrines are supposed to guard interests which would suffer as greatly from forced public revelations to

say, even if it falls within no standard exception to the hearsay rule, should be admissible in non-jury suppression hearings, to be accorded such weight as, in the circumstances, it merits. Cf. *Chambers v. Mississippi*, 410 U.S. 284.¹⁹ In other words, we contend it was error for the courts below to hold the out-of-court statements involved here to be inadmissible simply because they involved hearsay.²⁰ That the excluded statement were reliable is shown *infra* (pp. 28-29).

3. That the rule we urge is sound is attested, finally, by the fact that its substance is incorporated in one of

a judge as from like revelations to a jury. But this shift does furnish good cause for taking unconventional short cuts through the hearsay rule and other doctrines intended wholly or principally to guard against erroneous findings of fact in the very trial." (Emphasis in original; footnotes omitted.)

¹⁹ In *Chambers* this Court held that it was a denial of due process in the circumstances of that case to exclude reliable hearsay offered by the defendant at a criminal trial (confessions by one not on trial, made under circumstances suggesting they were trustworthy, to the offense charged). If to exclude trustworthy hearsay from consideration by the *jury* can in some instances be not only erroneous but fatally so, it would appear to follow a *fortiori* that trustworthy hearsay should be admissible in the court's discretion at a hearing in which no *jury* participates.

²⁰ Whether any relaxation of the evidence rules in general (or of the hearsay rule in particular) may, or should, be permitted where the court sits as the trier of the ultimate facts (as at a jury-waived trial) need not be considered in this case. Cf. Note, *Applicability of Rules of Evidence Where the Judge is the Trier of Facts in an Action at Law*, 42 Harv. L. Rev. 258 (1928). Our contention as to the permissibility of such relaxation is limited to pretrial and intra-trial hearings as to the admissibility of evidence at the trial proper.

the proposed new Federal Rules of Evidence."²⁰ Rule 104(a) specifically provides in relevant part:

Preliminary questions concerning * * * the admissibility of evidence shall be determined by the judge * * *. In making his determination he is not bound by the rules of evidence except those with respect to privileges.

Thus this Court, in proposing these Rules to Congress, has endorsed the substance of the precise contention the government here makes.²¹

B. The hearsay involved here was reliable.

That Mrs. Graff's out-of-court acknowledgements were reliable is apparent from the circumstances in which they were made.²² The statements were candid,

²⁰ The Rules were originally scheduled to have become effective on July 1, 1973. Under Pub. L. 93-12, 87 Stat. 9, signed by the President on March 30, 1973, the effectiveness of the rules is indefinitely suspended until further affirmative action by Congress.

²¹ That the Court's endorsement is in the form of a proposed statute-type Rule, to take effect in the future, is no obstacle to the Court's adoption of the substance of the Rule as the appropriate rule for decision of this case. The legal precedents in the field are scattered and inconclusive, as noted earlier, and the proposed new Rule is merely the sanctioning, with proposed statutory force, of a procedure whose justification is rooted in principle and practice.

²² Neither court below suggested that they were unreliable. Nor has respondent done so at any stage of the proceedings. All have taken the position that the statements were inadmissible simply because they were technically hearsay.

matter-of-fact, and, if not "against interest" in any usual or legally recognized sense, at all events in no sense self-serving. When in response to the investigating officers' inquiries Mrs. Graff stated that she occupied the east bedroom with respondent (a man to whom she was not married and whom she had just observed being arrested, see A. 19), there is, it is submitted, no rational basis for viewing the statement as other than the truth. The same is true of her acknowledgements a moment later—after she had led the officers to the bedroom and consented to its search—that she and respondent shared the room's dresser and that the women's clothing in it was hers. Her statements to the F.B.I. agents later the same day, acknowledging that she and respondent had been sleeping together regularly in the bedroom, were similarly and equally trustworthy. The acknowledgements, moreover, being consistent as well as candid, were corroborative of one another. Cf. *Chambers v. Mississippi*, *supra*, 410 U.S. at 300. In addition, all were corroborated by the statements which Mrs. Graff and respondent had both made to persons in the community, prior to the search, indicating that they were husband and wife (*supra*, pp. 5-6)—as well as by the evidence (non-declaratory in character) which the district court did consider in finding that the couple had cohabited at least "at times" in the bedroom (Pet. App. C, pp. 15a-16a; see *supra*, pp. 4-6). The excluded statements, in short, were made in such circumstances as to provide unusually strong assurances of reliability.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed.²²

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²² If the Court should sustain the government's principal contention (Point I, *supra*, pp. 11-17), the suppression order should be ordered vacated insofar as it pertains to the seized \$4,995 (the only item whose suppression is here challenged) and the case remanded to the district court for consideration of the question—not previously reached by it—whether the search was valid in the absence of advice to Mrs. Graff by the investigating officers that she was not obliged to consent to it (see Pet. App. C, p. 17a; note 2, *supra*). In making that determination, the court would of course be bound by this Court's holding in *Schneckloth v. Bustamonte*, No. 71-732, decided May 29, 1973. If the Court should reverse on the ground that the court below applied an erroneous standard of proof, remand to that court—for reconsideration, in light of the proper standard of proof, of whether the government had sufficiently proved that Mrs. Graff was a joint occupant of the bedroom—would be appropriate. If the reversal were based on the ground of erroneous exclusion of the out-of-court statements of Mrs. Graff and respondent, remand to the district court, for reappraisal of the sufficiency of the proof of joint occupancy in light of that evidence, would be indicated.

